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No. 96-631

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HOWARD G. JOHNSON,

Petitioner,

vs.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, et. al.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

TABLE OF CONTENTS

		Page
Table of Citations	.....	ii
STATEMENT OF THE ISSUES	.....	1
I.	The Significance of Public Support for a Party by a Senior Circuit Court Judge and Contamination of a Panel Merits Review	1
II.	The Younger Bias Exception Applies When a State Supreme Court Appoints Employees to a Party and Judges Are Employees of a Party	3
CONCLUSION	.....	10

TABLE OF CITATIONS

Cases	Page
Aetna Life Insurance Co. v. La Voie 475 U.S. 813, 106 S. Ct. 1580, 89 L.Ed.2d 823 (1986)	4
Gibson v. Berryhill 411 U.S. 564 (1973)	3
Hirsh v. Justices of the Supreme Court of the State of California 67 F.3d 708 (9th Cir.) (1995)	2, 9
In re Murchison 349 U.S. 133, 75 S. Ct. 623, 99 L.Ed. 942 (1955)	4
United Church of the Medical Center v. Medical Center Comm. 689 F.2d 693 (7th Cir. 1982)	8
Vanelli v. Reynolds Sch. Dist. No. 7 667 F.2d 773 (9th Cir. 1982)	9
Winthrow v. Larkin 421 U.S. 35 (1975)	4
Younger v. Harris 401 U.S. 37 (1971)	1, 3, 10

Statutes

California Business and Professions Code

Section 6086.5 9

28 U.S.C. Section 455 (a) 1

Treatises & Publications

K. Davis,

Administrative Law 340. 4

R. Flamm,

Judicial Disqualification: Recusal and

Disqualification of Judges, p. 202, fn. 2 4

Stempel, Rehnquist,

Recusal and Reform

53 Brook.L.Rev. 589 (1987) 1

STATEMENT OF THE ISSUES

Is not the possibility of contamination of proceedings within a Circuit Court by the active and public participation of a senior judge as spokesman for a party on its constitutional issues an important federal question for this Court?

Is not judicial bias based on partisanship for a party an important exception to *Younger* abstention?

I. The Significance of Public Support for a Party By a Senior Circuit Court Judge and Contamination of a Panel Merits Review

There are few sources available concerning the disqualification of appellate federal judges. Stempel, Rehnquist, Recusal and Reform. 53 Brook. L. Rev. 589, 638 (1987). 28 U.S.C. section 455 (a) states that "any justice... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Whenever a reasonable observer could reasonably infer that the challenged judge has lost his impartiality, an appellate justice in the federal court system should recuse himself.

Three California Circuit Court judges summarily dismissed the appeal after the filing of the opening brief which raised the issue of their disqualification due to the public advocacy and participation by their California colleague, Senior Judge Arthur Alarcon, for the State Bar party and its claimed

court, the constitutionality of which was the issue presented in the appeal.

Then they barred the filing of any further papers. "No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submission shall be filed or entertained in this closed docket." Appendix 1a.

There does not appear to be a procedure within the Circuit Courts which is followed to require a federal judge to check if a party who has requested his participation in its cause has pending litigation in the multi member tribunal in which he sits. Had Judge Arthur Alarcon checked the docket, he would have discovered four cased concerning the State Bar of California and its claimed Court pending in the Court in which he sat before he accepted his appointment with it. Before he made over fifty public statements in support of that party and its Court, wisdom should have dictated he check the docket to ascertain whether his public statements for the press would likely influence his colleagues in their determination of the constitutional issues concerning that party. These remedial steps were not taken.

Was there tribunal contamination? The rapidity with which the **Hirsh v. Justices of the Supreme Court of the State of California** 67 F.3d 708 (9th Cir. 1995) decision issued, without addressing the constitutional issues, the summary dismissal of this Petitioner's appeal upon filing of the opening brief raising the recusal and contamination issue; the panel consisting of solely California judges who are Judge Alarcon's California colleagues who had daily access to the press statements he made for a party and its claimed Court; and the bar to filing

any papers is indicative of the hostility, actual bias and inflamed rage that was created by the persistent press statements by Judge Alarcon in support of a party and its Court and the confrontation with his public support for a party which was presented by the appeal alleging this party's Court is unconstitutional.

Were the three California judges required to recuse themselves? An objective observer would conclude that the news articles and press statements made by Senior Judge Arthur Alarcon suggesting improvements to the party's Court and describing it as a fair system blinded his three California colleagues and their duty to decide fairly. Their blinded eyes saw red when the issue was raised. They slammed the door to the courthouse so that no one would see.

This Court is the only available Court to prevent appearances of impropriety and of conflicts between personal caused and the duty of federal appellate justices to recuse themselves when their impartiality is reasonably questioned. This is an important federal question for this Court to decide.

II. The *Younger* Bias Exception Applies When a State Supreme Court Appoints Employees to a Party and Judges are Employees of a Party

A well-recognized exception to the application of *Younger* abstention is bias in a state adjucator. **Gibson v. Berryhill** 411 U.S. 564 (1973).

Judges are disqualified for interest in the outcome. **Aetna Life Insurance Co. v. La Voie** 475 U.S. 813, 822, 106 S.Ct. 1580, 1585, 89 L.Ed. 2d 823 (1986). This Court's decision in **Aetna** did not limit the application of the necessity of disqualification of a judge to a direct financial interest. This Court stated in **Aetna, supra,** "what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision," (quoting **In re Murchison** 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Everyone agrees that interest in the outcome disqualifies a judge. The problem is what kind of activity makes a cause one's own. K. Davis, Administrative Law 340 as set forth in R. Flamm, Judicial Disqualification; Recusal and Disqualification of Judges, p. 202, ft. 2, "Not only is a biased decision-maker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." **Withrow v. Larkin** 421 U.S. 35, 47 (1975).

This Petition addresses the "other interest" disqualification standard.[1] This petition is important in addressing what degree of partnership for a party requires a judge's recusal.

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[1] "In those jurisdictions in which disqualification for "other interests" has been authorized, however, the term "other interests" has usually been poorly defined, (footnote omitted), a fact that had led to confusion on the part of both federal judges (footnote omitted), and those of many state courts. Because of this confusion, determining precisely what types of "other interests" may suffice to merit judicial disqualification is not a simple task. (footnote omitted)." R. Flamm, Ibid. at 216.

There are circumstances beyond pecuniary interest where a judge has a temptation not to hold the balance nice, clear and true. Respect for the judicial function requires forbearance from an appearance of impropriety. Extrajudicial interest in the outcome of a case by a judge taints a judicial proceeding with suspicion within the Public's mind.

When the circumstances indicate there is a basis for this suspicion, the higher duty of the Courts may be to remove a judge who suffers from no actual bias, but whose factual relationship to the issues and parties suggests a temptation toward unconscious leaning for a party involved.

What are the interests implicated in the creation by the California Supreme Court of a private court owned and run by a private prosecuting party and staffed by its appointees employed by that party? Its first interest is to cut down on its workload. Relieving itself from admitting and disciplining attorneys and placing those functions in the hands of private persons does relieve the California Supreme Court's workload. While court congestion is a legitimate concern of the courts, removing the highest state court's duty to admit and discipline its court officers may be false efficiency. The morale of California court officers is low. They have no Court to guide them. Lack of morale leads to discipline problems. It leads to alienation of attorneys from their self-respect and dignity as court officers. Attorneys licensed by employees of a State Bar are not court officers. They are bar functionaries. They have no allegiance to the Courts or the law. They are loyal to the private interests of the State Bar entity, and not the public interests of the Courts and the calling of the law.

The second interest of the California Supreme Court served by its appointing employees to a party to be judges licensing attorneys is expense. The taxpayers do not have to pay for the licensing of attorneys. They do not have to pay for its State Supreme Court to consume time and resources researching, writing and publishing opinions concerning attorney ethics and admission and discipline of attorneys, because it does not do so. Its appointees, as employees of the prosecuting party, write and, from their own private funds, pay for their opinions for the California Supreme Court. As employees of the prosecuting party, they always decide for their employer and against each accused attorney. The California Supreme Court's summary denial of review for over six years then contains an order for the adjudged guilty attorney to pay costs to the State Bar. These are the administrative costs necessary to pay the salaries and benefits of the appointees of the California Supreme Court and their co-employee prosecutors and investigators.

The third interest of the California Supreme Court is to ensure that its appointees to the privately financed prosecuting party are paid and provided their staffs, facilities and expenses. The minimum one million dollar expense for its appointees' privately financed salaries is paid by the California Supreme Court denying review to each accused and ordering the now adjudged guilty attorney to pay the costs for the salaries and benefits of its appointees. As set forth in the California State Auditor's report of May, 1996, $16,241,790 has been assessed by the California Supreme Court as costs payable to the employer of its appointees for the four years of 1992-1995 from guilty

adjudications against accused attorneys. $4,428,664 of that sum is the administrative costs assessed for its appointees' salaries, benefits, expenses, staffs and facilities.[2]

The fourth interest of the California Supreme Court is to prevent a depletion of funds of the employer of its appointees so that its appointees are provided staffs, facilities, expenses, training and their salaries. This is guaranteed by it making sure no accused attorney is ever found innocent, since, by statute, this would enable such an accused attorney to collect his reasonable expenses of defending the proceedings from the employer of its appointees. The second method of making sure ample funds are available to provide for its appointees to the prosecuting party is to make sure attorneys know they have no chance of ever being found innocent and of obtaining impartial review of guilty adjudications by its appointees. This it has done by denying over all petitions of accuseds summarily per curiam since 1989 when it first appointed its nine appointees and by assessing costs based on how long the accused fights for its innocence by escalating the costs awards based on what stage of the proceeding obtains the guilty adjudication. Assessments before notice are generally less than $2,000. Once a notice issues, it is a minimum of $4,466. For each day of trial, it is an additional $500-$1000 a day. These cost awards are then added to the attorney's dues' bill, and if not paid, result in summary ex parte suspension of the attorney.

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2 California State Auditor, State Bar of California: Opportunities Exist to reduce Fees, Better Control Administration and Planning, and Strengthen and Improved Discipline Process, at page 10.

The fifth interest of the California Supreme Court is speed of disposition. With partisan appointees hire, paid, trained, provided their staffs, facilities, and expenses by a private party, and provided these benefits based on how fast and how much monies from accuseds they obtain for their employer, proceedings are quickly disposed of. All motions, petitions, discovery requests, continuances, requests of accuseds are summarily denied with no law or facts stated. This has yielded 5,000 guilty adjudications in six years in a mill operation of preordained result.

The issue is not financial interest in the adjudicators. While the State Supreme Court and its appointees do not pocket the sixteen million dollars obtained in four years, they adjudge guilt to obtain these monies so as to finance the private court system in which they have a vested interest. This is similar to **United Church of the Medical Center v. Medical Center Comm.** 689 F.2d 693 (7th Cir. 1982). The monies are obtained for a fund which is earmarked for their employer's use.

While there is a presumption of impartiality within adjudicators, the fact that the financial beneficiary of guilty adjudications is the employer of the State Supreme Court's appointees, and the administrative adjudicators are employees of the prosecuting party and provided their benefits, housing, training, pay, expenses, and staffs by that party, should overcome the presumption. Each adjudicator is partisan for a party. It is the prosecuting party's interest they serve, not impartial justice. While not a financial interest of a direct nature, it is an institutional, inherent and structural bias for a party.

Hirsh, supra did not address the relationship to financial beneficiary and the partisanship issue. It stated, "Under California law, attorney disciplinary matters are handled by the State Bar Court ("Bar Court"), an administrative agency affiliated with the California State Bar Association ("State Bar"). Calif. Bus. & Prof. Code at 6086.5... The Hearing Department...conducts a... hearing during which the accused attorney and a State Bar prosecutor present evidence before a Bar Court judge." Appendix 4a. The statute provides that the court is run, owned and created by the prosecuting party, not affiliated with it. "The Board of Governors [of the State Bar of California] shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary...proceedings." Appendix 17a, section 6086.5. Its judges are, by statute, selected, housed, paid and trained by the prosecuting party and "the Board [of Governors of the State Bar of California] shall fix and pay [them] reasonable compensation and expenses and provide adequate supporting staff and facilities." Appendix 17a **Hirsh, supra,** did not address that which it mentioned-the claimed Court and its judges are owned by a party.

Hirsh, supra, states, "Appellants offer only conjecture in support of their claim that Supreme Court justices are impermissibly biased because they appoint Bar Court judges. As the district court noted, district court judges are not deemed incompetent to review the findings of magistrate judges whom they participate in appointing. Compare **Vanelli v. Reynolds Sch. Dist. No. 7,** 667 F.2d 773, 779-80 & n. 10 (9th Cir. 1982) (school board reviewing its own prior decision was not

impermissibly biased)". Appendix 17a. It is the appointment of judges employed, housed, trained, provided their salaries and benefits and complete staffs by a privately financed prosecuting party that is the bias issue. It was not addressed.

CONCLUSION

The Ninth Circuit denied due process. The bias exception to *Younger* abstention deserves review. It is a substantial federal question to have 155,000 attorneys lacking an impartial State Supreme Court to listen to them.

It is a substantial federal question to have employees of a prosecuting party adjudicating guilt and obtaining for their private employer sixteen million dollars to pay for their expenses.

For the foregoing reasons this Honorable Court should grant the Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

HOWARD JOHNSON
Petitioner *Pro Se*